IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MAJOR and MARK MAJOR, Appellants, v. MARK D. HODGSON and MAXEY LAW OFFICE, Respondents.	)	No. 64858-6-I DIVISION ONE UNPUBLISHED OPINION FILED: May 3, 2010

Dwyer, C.J. — Michael and Mark Major filed this action against attorney Mark Hodgson and the Maxey Law Office alleging claims including fraud, breach of contract, and criminal conspiracy. Because the trial court correctly concluded that the Majors, in some instances, failed to demonstrate the existence of any genuine issues as to material facts and, in other instances, alleged claims that are not cognizable under Washington law, we affirm the dismissal of all claims. We also find that the Majors' appeal is frivolous and award attorney fees on appeal pursuant to RAP 18.9.[1]

[1] This appeal was transferred to us from Division Three of the Court of Appeals.

I

This appeal, in which Michael Major and his son Mark Major[2] challenge superior court orders dismissing their causes of action against the Maxey Law Office (Maxey) and attorney Mark Hodgson, arises out of events that occurred during an earlier lawsuit. On April 5, 2007, the Majors filed an action in Spokane County Superior Court against Lacey Major, Mark's ex-wife, alleging claims of false incriminations, wrongful incarceration, an ongoing conspiracy of Lacey and her mother "to effect a wrongful death of Mark Major," first degree assault on an infant, acts of domestic violence against Mark, false accusations of stalking, perjury, ongoing child abuse, parental negligence, entrapment, negligent and intentional infliction of emotional distress, illegal substance abuse, "[w]renching Mark from his children," and ongoing welfare fraud.

On April 26, 2007, attorney Mark Hodgson appeared on behalf of Lacey Major and filed a response to the Majors' complaint. The Majors moved for partial summary judgment and noted multiple motions for a hearing on June 29, 2007.

On June 8, 2007, Lacey moved to dismiss the Majors' action for failure to state a claim under CR 12(b)(6) and requested sanctions under CR 11. Hodgson noted the motion to dismiss for a hearing on June 15, 2007.

On June 13, 2007, Michael filed a pro se motion to continue Lacey's motion to dismiss, seeking a new hearing date of June 29. In support of the motion to

[2] When necessary for purposes of clarity, we refer to the Majors by their first names.

continue, Michael alleged that the short notice for the June 15 hearing posed a serious hardship that would prevent the Majors from participating. Later on June 13, Michael, who lived in Anacortes, contacted the Maxey Law Office in Spokane, seeking representation in conjunction with the June 15 motion to dismiss. Mark Major lived in Spokane. Later that evening, attorney David Partovi of the Maxey Law Office telephoned Michael.

Although the precise details of this conversation and several subsequent conversations are disputed, the parties agree that Partovi informed Michael that service of the notice for Lacey's CR 12(b)(6) motion appeared to be untimely, providing a legal basis to continue the June 15 hearing date. It is also undisputed that Partovi accepted Michael's offer of $1,000 to represent the Majors for the limited purpose of filing a notice of appearance and seeking a continuance of the June 15 hearing date to at least June 29.

After the initial conversation, Michael faxed Partovi copies of the motion for continuance that he had filed, the complaint, and other pleadings. In a cover letter, Michael explained that if his litigation strategy proceeded as planned, Partovi might be retained for additional representation, but he acknowledged the parties' current agreement to be limited as follows:

> Our agreement is that I will pay you $1000 in credit card for you to put in a notice of appearance and continue the Friday [June 15, 2007] hearing until the noted hearings of June 29. You indicated you would contact Hodgson.
> . . . .
> Our agreement, at this point, is that you will do step one – notice of

appearance, and get it continued – for $1000.

Michael also signed a Nonrefundable Retainer Agreement that Partovi had prepared.

The next day, June 14, 2007, Partovi filed a notice of appearance and a declaration of counsel in support of the motion for continuance, arguing that service of the notice of the June 15 hearing was untimely under the 5-day requirement of CR 6. Partovi stated that the motion to dismiss appeared to involve matters outside the pleadings and would therefore trigger the 28-day notice requirement of CR 56, in which case the hearing should be held after July 9. In the alternative, Partovi proposed that for purposes of judicial economy, the motion to dismiss should be scheduled for June 29. Partovi also filed Michael's declaration in support of the continuance, which recited Michael's unavailability on June 15 because of a heart condition and difficulty in obtaining counsel.

On the afternoon of June 14, Partovi met with opposing counsel Hodgson. According to Partovi, Hodgson acknowledged that service of the motion to dismiss was untimely, but refused to strike the motion or agree to a continuance. Because of a prior commitment, Partovi was unable to attend the scheduled hearing on June 15, and, with Michael's knowledge, arranged to send an associate, Camerina Brokaw-Zorrozua to court in his stead.

Upon arriving at the courtroom the following morning, Brokaw-Zorrozua discovered that Hodgson had not confirmed the hearing as required by local rules

and that the motion to dismiss was therefore not scheduled on the docket. At some point on June 15, Hodgson renoted the motion to dismiss for June 22, 2007, and served a copy on Maxey.

At around 4:00 p.m. on June 15, Partovi called Michael and advised him of the status of the case. Michael claims that he asked Partovi to seek a continuance of the hearing that was now scheduled for June 22. Partovi acknowledges that he declined to expand the scope of the original agreement and advised Michael that there were significant problems with his pleadings. The parties agree that the exchange became heated and ended when Michael hung up after advising Partovi, "Well fine. You've just sunk your career."

Believing that Michael had terminated his employment, Partovi requested that his office file a notice of withdrawal. For purposes of summary judgment, Maxey does not dispute Michael's claim that Maxey did not provide him a copy of the notice of withdrawal.

Beginning on Monday, June 18, 2007, Michael served and filed a series of motions in the action against Lacey, including a motion for partial summary judgment, a motion to deny Lacey's motion to dismiss, an emergency motion for injunctive relief, and a motion for sanctions "against lawyers for criminal conspiracy." Michael noted the motions for June 22. Counsel for Lacey served all responses on Michael.

No further hearings occurred until July 20, 2007, when the trial court granted

Lacey's motion and dismissed the Majors' action with prejudice. The court also granted Lacey's motion for sanctions and dismissed Michael from the action, concluding that he lacked standing to assert what were essentially Mark's claims arising out of the dissolution proceedings. The trial court ruling was affirmed on appeal. See Major v. Major, No. 26481-5-III, review denied, 165 Wn.2d 1026 (2009).

On July 9, 2007, the Majors filed this action against Mark Hodgson and the Maxey Law Office in Skagit County Superior Court, alleging claims including fraud, breach of contract, and criminal conspiracy. The complaint sought damages of $1,000,000.00, disbarment of Hodgson and the Maxey attorneys, and an order directing the prosecutor to conduct a criminal investigation into the defendants' activities.

Hodgson did not respond to the complaint, and the trial court entered an order of default as to Hodgson on August 14, 2007. The court found venue improper as to Maxey and, in a separate order, transferred venue to Spokane County Superior Court.

Maxey and the Majors both filed motions for summary judgment. Hodgson did not participate in the summary judgment proceedings. On July 23, 2008, the trial court denied the Majors' motion for summary judgment and motion for discovery sanctions against Maxey and Hodgson. The court granted Maxey's motion for summary judgment and dismissed all claims against Maxey. The court further found that the Majors' complaint and motion for summary judgment were (1) not well

founded in fact, (2) not warranted by existing law, (3) filed maliciously and interposed for the purpose of harassing the Maxey Law Office, and (4) brought "dishonestly, deceitfully, and in bad faith." The court awarded Maxey attorney fees and costs of approximately $24,000 pursuant to CR 11. In a separate ruling, the court granted Hodgson's motion to set aside the Skagit County order of default for improper venue and dismissed the Majors' action against Hodgson under CR 12(b)(6). The court denied the Majors' motion for reconsideration on July 30, 2008. The Majors appeal all three orders.

II

The trial court dismissed the Majors' claims against the Maxey Law Office on summary judgment.[3] When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

[3] Before this case was transferred to Division One, a Division Three commissioner referred Maxey's motion on the merits to affirm to a panel of judges. See RAP 17.2(b). Because we have addressed all relevant issues on appeal, that motion is denied as moot.

Maxey argues that the trial court's unchallenged findings of fact are binding on appeal and, in any event, supported by substantial evidence. However, because we review the record de novo, findings of fact entered in summary judgment proceedings are "merely superfluous" and the Majors' failure to assign error to them does not make them verities on appeal. Gates v. Port of Kalama, 152 Wn. App. 82, 86 n.6, 215 P.3d 983 (2009) (quoting State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962)). Moreover, because the trial court characterized its findings as undisputed material facts, the substantial evidence test does not apply. To the contrary, summary judgment is not warranted if reasonable minds could draw different conclusions from undisputed facts or if all of the material facts are not present. Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 297-298, 914 P.2d 119 (1996).

III

In their complaint, the Majors allege that the Maxey attorneys agreed to seek a continuance of Lacey's motion to dismiss, noted for June 15, 2007, and then breached the agreement when they failed to request a continuance. They further allege that Maxey's failure to perform its obligation under the agreement became part of a massive criminal conspiracy by the Maxey attorneys, opposing counsel Hodgson, and all participating judicial officers to betray the Majors, obstruct justice, and prevent the Majors from obtaining a fair trial of their allegations against Lacey. The Majors claim that the defendants' actions subjected them to liability for fraud,

breach of contract, breach of the "ABA Code of Professional Conduct," "cheating at the law and rules of civil procedure," and joining a criminal conspiracy.[4]

The trial court concluded that the only claims in the Majors' complaint that are recognized under Washington law are fraud and breach of contract. On appeal, the Majors have not challenged the trial court's determination that they may not maintain an action for criminal conspiracy or violation of the Rules of Professional Conduct. See Hizey v. Carpenter, 119 Wn.2d 251, 259, 830 P.2d 646 (1992) (breach of ethics rules does not provide private remedy). Nor have the Majors identified a cognizable cause of action for "cheating at the law and rules of civil procedure."

To establish fraud, a plaintiff must demonstrate: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) speaker's knowledge of its falsity, (5) speaker's intention that it shall be acted upon by the plaintiff, (6) plaintiff's ignorance of falsity, (7) reliance, (8) right to rely, and (9) damages. Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Even when viewed in the light most favorable to the Majors, the evidence does not support an inference that a Maxey attorney made a false representation of an existing fact to Michael that resulted in injury.

As the moving party under CR 56, Maxey satisfied its initial burden by showing the absence of admissible evidence to support all of the elements of the Majors' claims. See Schaaf, 127 Wn.2d at 21. The burden then shifted to the

[4] The trial court concluded that the Majors had failed to demonstrate a material factual issue supporting a claim of professional negligence. Because the Majors do not assert such a claim, we do not discuss it further.

Majors to set forth specific facts demonstrating a genuine material issue for trial. To meet this burden, the Majors may not rely

> on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (footnote omitted).

On appeal, the Majors do not address the necessary elements of a claim of fraud, much less identify admissible evidence establishing the existence of a genuine factual issue for trial. As in the trial court, the Majors rely primarily on conclusory allegations of misconduct and the existence of a vast criminal conspiracy. Because the Majors failed to submit evidence establishing a material factual issue, the trial court properly dismissed their fraud claim on summary judgment.

In order to maintain their breach of contract claim, the Majors must demonstrate (1) the existence of an enforceable contract, (2) the parties' obligations under the contract, (3) violation of the contract, and (4) damages proximately caused by the breach. Citoli v. City of Seattle, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002). The Majors claim that Partovi breached the terms of the agreement by not filing a "motion for continuance" or appearing in court and asking a judge for a continuance of the motion to dismiss that Lacey had noted for June 15, 2007. But the Majors mischaracterize the nature of Maxey's performance of the agreement.

It is undisputed that the scope of Maxey's representation was limited to obtaining a continuance of the motion to dismiss that Lacey had noted for June 15, 2007. It is also undisputed that on June 14, in accordance with the terms of the agreement, Partovi filed a notice of appearance and a declaration in which he asserted the legal basis for a continuance and requested a continuance either until June 29 or after July 9. Counsel's actions must be viewed in conjunction with the existing motion for a continuance that Michael himself had already filed on June 13. Consequently, the Majors' claim that Partovi breached the agreement by not filing a document labeled "motion" is frivolous.

In addition, Partovi also spoke with opposing counsel, who refused to agree to a continuance. Partovi's associate therefore went to court on the morning June 15, the scheduled hearing date, and learned that Lacey's motion had not been docketed for that day because opposing counsel did not confirm the hearing as required by local rules. Consequently, contrary to the Majors' assertion, there was no longer a matter pending before the court to continue. The Majors have not made any showing that Maxey breached the terms of the agreement by not undertaking further actions at this point.

The Majors seem to argue that because Lacey renoted the motion to dismiss for June 22, Maxey was obligated to seek a continuance of that hearing as well. But they have not identified any admissible evidence supporting an inference that the parties' agreement encompassed any obligations that extended beyond the originally

scheduled hearing date of June 15. In fact, no further hearing occurred until July 20, well past the date that the Majors originally requested. The trial court properly dismissed the Majors' breach of contract claim on summary judgment.

The Majors next contend that Maxey failed to comply with the 10-day notice requirement for withdrawal by notice. See CR 71(c). The parties dispute the precise nature of the conversation that led to the filing of a notice of withdrawal on the afternoon of June 15. But for purposes of summary judgment, Maxey concedes that the notice of withdrawal was not properly drafted and that Michael did not receive a copy of the notice of withdrawal.

An attorney's strict compliance with CR 71 is unnecessary if there has been no prejudice. Lockhart v. Greive, 66 Wn. App. 735, 742, 834 P.2d 64 (1992). Michael was clearly aware that the relationship with Maxey had ended, as he immediately resumed filing all pleadings in the actions against Lacey, including a motion for sanctions against Partovi. Opposing counsel served all subsequent pleadings on Michael. Because the Majors have not demonstrated that any irregularity with regard to the notice of withdrawal impeded their ability to proceed in the action against Lacey (or identified any other prejudice), Maxey's failure to comply with CR 71 provides no support for the Majors' claims.

IV

The Majors next challenge the trial court's order setting aside the Skagit County order of default entered against Hodgson and then dismissing the Majors'

complaint against Hodgson pursuant to CR 12(b)(6).

An order of default entered in a county of improper venue is valid "but will on motion be vacated for irregularity pursuant to rule CR 60(b)(1)." CR 55(c)(2). We review a trial court's decision on a motion to vacate an order of default for an abuse of discretion. Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). Although a party seeking to set aside an order of default need not demonstrate a defense on the merits, the presence of a meritorious defense provides additional support for a decision to vacate the order. See Canam Hambro Sys., Inc. v. Horbach, 33 Wn. App. 452, 455, 655 P.2d 1182 (1982).

Generally, a lawsuit must be filed in the county in which the defendant resides. See RCW 4.12.025(1). It is undisputed that the Majors knew and alleged that Hodgson lived in Spokane County. Under the circumstances, the Majors have not shown that the trial court abused its discretion in setting aside the order of default under CR 55(c)(2).

The Majors allege that in setting aside the order of default, the trial court "falsified" the Skagit County record by suggesting the Skagit County trial judge had found venue improper as to Hodgson. This contention mischaracterizes the trial court's ruling. By setting aside the Skagit County order of default, the trial court necessarily recognized its current validity. The court's decision was based on its own analysis of venue and application of CR 55(c)(2). The court did not find or suggest that the Skagit County trial judge had found venue improper as to Hodgson.

Rather, the trial court merely noted that the Skagit County judge had found venue improper as to the claims against Maxey Law Office. Those claims formed the primary focus of the Majors' action.[5]

The Majors also contend that the trial court erred by dismissing the action against Hodgson because he repeatedly "defaulted" anew by failing to respond to summary judgment motions, interrogatory requests, and requests for documents after venue was transferred from Skagit County to Spokane County. But Hodgson had already been found to be in default, and he was not permitted to participate in the ongoing proceeding against Maxey. As the trial court correctly noted, the Majors did not identify any legal obligation requiring Hodgson to respond to the discovery requests as part of the proceeding against Maxey or cite any authority suggesting that the alleged "defaults" had any legal significance. The Majors' contention that the trial court had expressly authorized them to pursue discovery against Hodgson is frivolous as it rests on a comment, taken out of context, in a proceeding involving the discovery requests directed to Maxey.

V

The Majors next contend the trial court erred in denying their motion for discovery sanctions against Maxey. They acknowledge that in response to the trial court's motion to compel, Maxey attorneys provided answers to interrogatories and

[5] The Majors have not challenged the order transferring venue or alleged any resulting prejudice. See Hauge v. Corvin, 23 Wn. App. 913, 915-16, 599 P.2d 23 (1979) (party who challenges venue decision at the end of proceeding without seeking discretionary review must demonstrate prejudice).

participated in a deposition. After reviewing the documents submitted in support of the motion for sanctions, the trial court found that no discovery violations had occurred, noting that Maxey had generally answered the interrogatories and raised proper objections based on the rules of evidence during the deposition.

On appeal, the Majors offer nothing more than conclusory allegations of improper conduct. They have not identified any specific incomplete answer to an interrogatory or demonstrated that any specific objection during the deposition was improper. Consequently, they have not demonstrated that the trial court abused its broad discretion to determine discovery sanctions. See Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

The Majors contend that Maxey's counsel participated in an "illegal ex parte meeting" to obtain an improper temporary restraining order. They argue the order was improperly based on an affidavit containing "69 counts of libel and perjury."

In support of their claim, the Majors rely solely on references to documents filed in the trial court and a letter to the bar association. This is nothing more than an improper attempt to incorporate trial court arguments by reference into an appellate brief. See U.S. West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n, 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997). Because the Majors have not presented any argument in their appellate brief demonstrating a deficiency in the trial court's issuance of a temporary restraining order, the issue is waived. Kwiatkowsky v. Drews, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008). And, in

any event, because the trial court granted the Majors' motion to terminate the temporary restraining order, the Majors' allegations are moot.

VI

Maxey and Hodgson have requested an award of attorney fees for being forced to respond to a frivolous appeal. See RAP 18.9(a). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). That standard is satisfied here.

On appeal, the Majors challenged orders dismissing their claims against Maxey on summary judgment and vacating the order of default and dismissing their claims against Hodgson under CR 12(b)(6). The mere fact that the trial court vacated an order of default against Hodgson does not subject the Majors to sanctions. But as in the trial court, the Majors have not made any effort to conform their allegations to the elements of their alleged causes of action or to demonstrate that dismissal under CR 56 and CR 12(b)(6) was legal error. Rather, they rely almost exclusively on conclusory allegations of misconduct, unsupported by any meaningful legal argument or references to admissible evidence. An award of sanctions for a frivolous appeal is therefore appropriate.

Finally, the Majors filed a motion requesting, among other things, that the defendants be cited for fraud and referred to the appropriate authorities for criminal

prosecution. The motion is denied as frivolous.

The trial court's orders setting aside the order of default against Hodgson and dismissing the Majors' claims against Hodgson and Maxey are affirmed; both Maxey and Hodgson are awarded attorney fees on appeal, subject to compliance with RAP 18.1(d); the Majors' motion for a citation of fraud is denied.

Affirmed.

Dwyer, C.J.

We concur:

Appelwick, J.

Schindler, J.